Conclusion

It is submitted that the only question before the Court in the instant case was the guilt or innocence of the accused, that the decision of the Supreme Court of The State of New Hampshire rests solely upon local grounds and that no determination of any federal question was necessary or proper.

Respectfully,

GORDON M. TIFFANY,
Attorney-General for The State of New Hampshire.
HENRY DOWST, JR.,
Assistant Attorney-General.
ARTHUR E. BEAN, JR.,
Law Assistant.

August 29, 1952.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

GORDON M. TIFFANY,
Attorney-General for the State of New Hampshire;
HENRY DOWST, JR.,
Assistant Attorney-General;
ARTHUR E. BEAN, JR.,
Law Assistant,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS,

Appellant,

v.

THE STATE OF NEW HAMPSHIRE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3, of Rule 12, Rules of the Supreme Court of the United States, comes now The State of New Hampshire appellee, in the above-entitled case, by its Attorney General, disclosing the following matters or grounds making against the jurisdiction of the Supreme Court of the United States, as asserted by the appellant in a statement as to jurisdiction served upon the appellee on August 14, 1952.

Statement of the Case

The Appellant, a member of the Jehovah's Witnesses, was tried, found guilty, and fined twenty dollars in the Superior Court for Rockingham County, State of New Hampshire, for conducting an open-air meeting in a small park in the City of Portsmouth without a license, in violation of the following ordinance which the Supreme Court of the United States sustained as constitutional in *Cox v. New Hampshire*, 312 U.S. 569, 85 L. Ed. 1049.

> "Sec. 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the city council." *Municipal Ordinances of the City of Portsmouth*, chapter 24, article 7, section 22.

The right to a jury was waived [7]* and the appellant admitted the violation of the ordinance [20]. However, he interjected, over protests [29], proof that the City Council had arbitrarily and unreasonably refused to issue a license to speak on religious topics in Goodwin Park on two particular Sundays when the violations occurred and, hence, he argues that his constitutional rights of freedom of assembly, speech, and worship had been violated contrary to the Bill of Rights of the New Hampshire Constitution and the First and Fourteenth Amendments to the United States Constitution. In this regard, the Superior Court in reaching its verdict, reasoned as follows: [5]

> "Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact

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* Numbers appearing herein in brackets refer to the printed Bill of Exceptions.

that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that *this issue is not properly before it in these proceedings*". [Emphasis added]

The members of the City Council were not parties to the litigation although they were called by the appellant to testify. [33] No charges were made nor any proof introduced by the prosecution which placed in issue the reasonableness of the action of the City Council. The trial court observed that the appellant "could have raised the question of [his] right to [a] license to speak in Goodwin Park by proper civil proceedings in this Court, but [he] chose to deliberately violate the ordinance". [5]

I. No Substantial Federal Question is Presented.

A. Introduction.

Appellant seeks a review of the judgment of the New Hampshire Supreme Court under the provisions of 28 U.S.C. Sec. 1257 (2), which provides that:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. . . . "

In this case, the New Hampshire Supreme Court has stated:

> "It has been conceded by the defense on this transfer, as well as on the first one, that the ordinance is valid on its face. It is identical in language with the

statute that was construed as valid in *State* v. *Cox*, 91 N.H. 137, which was affirmed in *Cox* v. *New Hampshire*, 312 U.S. 569." *State* v. *Poulos*, 97 N.H. ——, No. 4113, Dec'd. April 26, 1952, as modified on Rehg. June 3, 1952.

Even if this review is entertained by the United States Supreme Court as if it were a petition for a writ of certiorari in accordance with Section 237 (a) of the Judicial Code (28 U.S.C. Sec. 344) as cited by the appellant in his statement, because it was "improvidently taken" in the form of an appeal, the Supreme Court could only consider the federal questions, if any, which had been passed upon by the State Supreme Court. *Wilson* v. *Cook*, 327 U.S. 474, 90 L. Ed. 793, 66 S. Ct. 663 (1946).

B. The record discloses affirmatively that in the opinion from which this appeal is taken, the decision of a Federal question was Not necessary to the determination of the case; that such a question was Not decided and judgment was in fact rendered without such a decision.

The respondent admitted his violation of the ordinance, and then excepted to the denial of his motion for acquittal and finding of not guilty. It was on the basis of this exception that the case was appealed to the Supreme Court of New Hampshire, which opined "Exceptions Overruled".

In support of his motion for acquittal in the lower court, the appellant had argued that the City Council had acted arbitrarily and capriciously—which in New Hampshire is the usual basis for certiorari. *State* v. *Poulos*, 97 N.H. 91, 88 A. 2d 860, 862. (Dec'd. April 26, 1952). He had further argued that it was the duty of the Council to issue a permit under the circumstances of the case. This, in New Hampshire is sufficient grounds for a mandamus. *State* v. *Poulos, supra.*

Neither argument is a defense to the complaint that the appellant committed the acts charged and did so without a license. These facts were established beyond a reasonable doubt by undisputed testimony. On this issue, which was the only issue raised by the exception, the legal principle applied in New Hampshire courts is that the "wrongful refusal to license is not a bar to a prosecution for acting without a license." *State* v. *Poulos, supra.* Thus, it is clear in the opinion of the court, that this question was decided on the adequate basis of local law—not federal. *State* v. *Stevens,* 78 N.H. 268, 99 Atl. 723. The decisions of other jurisdictions are in accord. *Phoenix Carpet Co.* v. *State,* 118 Ala. 143, 22 So. 627; *State* v. *Orr,* 68 Conn. 101, 35 Atl. 770.

The Court pointed out that certiorari was the adequate remedy for the defendant, and its decision did not deprive the appellant of protecting and enforcing his constitutional rights by this method. *State* v. *Poulos, supra,* at p. 863.

The State will concede that in instances where the constitutionality of the licensing statute is in doubt, or even undecided, there would be additional and persuasive considerations which would lend support to the appellant's position. *Hague* v. *C. I. O.,* 307 U. S. 496, 83 L. Ed. 1423, 59 S. Ct. 594; *Lovell* v. *Griffin,* 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666. However, where the record discloses that the speaker knew of the existence of the law [20], and that in applying for a license not only knew of the decisions of the United States Supreme Court on the activities of the Jehovah Witnesses but applied them in their presentation requesting a license [30], and that they nevertheless "deliberately" chose to violate the law, such considerations are completely answered. [5]. Under these circumstances, the courts of New Hampshire might well have

refused to hear testimony bearing on the reasonableness of the Council's action.

The argument of counsel on basis of federal question before the Court is not conclusive, since such arguments are not a part of the record. Nor can the fact that all counsel, including the representing appellee, considered federal questions in their brief be conclusive or even persuasive evidence that such an issue was considered when the opinion of the Court itself does not affirmatively disclose it as a necessary decision in its determination of the issue before it. *Gibson* v. *Chonteau*, Mo. 1868, 8 Wall. 314, 317, 19 L. Ed. 317; *Mutual Life Ins. Co.* v. *McGrew*, Cal. 1903, 188 U.S. 291, 47 L. Ed. 480; *Zadig* v. *Baldwin*, Cal. 1897, 166 U.S. 485, 41 L. Ed. 1087; *Sayward* v. *Denny*, Wash. 1895, 158 U.S. 180, 39 L. Ed. 941.

The best evidence upon which to determine whether or not the court considered a federal question, or should have considered it, and whether or not the determination of such a question was necessary to its conclusion, is the opinion itself. *State of Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 82 L. Ed. 685, 58 S. Ct. 443, 113 A.L.R. 1482; Rehearing Denied 303 U.S. 667, 82 L. Ed. 1123, 58 S. Ct. 641 (1938). The examination of the court's opinion to make this determination has been the accepted practice for more than a century. *Grand Gulf RR & Banking Co.* v. *Marshall*, 12 How. 165, 13 L. Ed. 938 (1851). The opinion itself is the original and authentic statement of the grounds of the decision under review. *Burbank* v. *Ernst*, 232 U.S. 162, 58 L. Ed. 551, 34 S. Ct. 229 (1914).

No certificate of the State Supreme Court is submitted by the appellant. Under the circumstances of this case, the omission is significant. The true function of such a certificate is to aid in understanding the record, to clarify

it by defining the federal question, if any existed, and by indicating how it was raised and decided. *Honeyman* v. *Hanan*, 300 U.S. 14, 81 L. Ed. 476, 57 S. Ct. 350; Appeal Dismissed 302 U.S. 375, 82 L. Ed. 312, 58 S. Ct. 273 (1937).

However, since it so clearly appears from the opinion in this case that no federal question was raised, a certificate to the contrary would have been inconsistent with the opinion, and have little weight in determining the question. It certainly could not have conferred jurisdiction on this court if the opinion itself did not raise the federal question. *Louisville, etc. R. Co.* v. *Smith*, 204 U.S. 551, 51 L. Ed. 612, 27 S. Ct. 401.

The opinion of the Supreme Court of New Hampshire on the basis of the Agreed Statement of Facts proceeds on such widely recognized doctrines of constitutional law as to foreclose further argument. Technically, the appeal here presented for consideration is based upon the quoted opinion of the New Hampshire Supreme Court dated June 3, 1952. However, in compliance with the requirements of paragraph 1 of Rule 12 of the Supreme Court of the United States, the appellant has appended to his statement on appeal, an earlier opinion in a companion case, apparently to assist in the determination of the grounds of the final judgment. While it is obvious from a cursory reading of the earlier opinion in *State* v. *Derrickson*, 97 N.H. 91, 81 A. 2d. 312, that the Supreme Court of New Hampshire, relying on an agreed statement of facts presented by the reserved case, was acutely aware of the difficulty of passing upon such a problem under the circumstances,—it was recognized that the problems of fundamental rights may well depend for a correct solution, on a full examination of the individual factual situation. Nevertheless, the Court proceeded upon grounds which were indisputably sound

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 4113

WILLIAM POULOS,

Appellant,

v.

THE STATE OF NEW HAMPSHIRE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

Now comes The State of New Hampshire, the appellee, herein, by Gordon M. Tiffany, its duly appointed, qualified and acting Attorney General, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein, to wit, by William Poulos, appellant, upon the following grounds:

(1) There is want of a substantial Federal question.

(2) It is manifest that the only Federal questions raised by the said appeal have been so explicitly decided by the Supreme Court of the United States in accordance with the

decisions of the Supreme Court of The State of New Hampshire, as to foreclose further argument on the subject.

(3) It is clear that the decision of the Supreme Court of The State of New Hampshire, affirming the convictions of guilty, denying the appellant's exceptions and upholding the constitutionality of the New Hampshire statute is correct.

In the alternative, appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to be taken on the three grounds heretofore mentioned in the appellee's motion to dismiss.

GORDON M. TIFFANY,
Attorney General of The State of New Hampshire.
HENRY DOWST, JR.,
Assistant Attorney General.
ARTHUR E. BEAN, JR.,
Law Assistant.

AUGUST 29, 1952.